

INFORMATION ITEM

WaterFix Update Regarding the Biological Opinions

Summary: This is one of an ongoing series of progress reports on the proposed conveyance project known as California WaterFix (WaterFix). Staff will discuss the recently released Biological Opinions (BiOps) relating to California WaterFix and anticipated/potential next steps for the project.

Background

A BiOp is a regulatory document required by the federal Endangered Species Act (ESA) when a federal agency action potentially could adversely affect a listed species or critical habitat. Section 7(a)(2) of the ESA requires federal agencies to enter formal consultation when such an action might occur.

In late June 2016, the National Marine Fisheries Service (NMFS) and U.S. Fish and Wildlife Service (USFWS) released their respective BiOps for the proposed WaterFix project.¹ Both BiOps found that the project would not result in jeopardy for the listed species and designated critical habitats under the agencies' jurisdiction. The BiOps, however, also acknowledged that specific aspects of the project are not yet fully determined. In particular, construction of the new North Delta Diversion intakes, construction of an operable Head of Old River Gate (HORG), and project operational criteria were evaluated at a programmatic level. As such, consultation may need to be reinitiated in the future to address the potential effect of these and other project elements on listed species and designated critical habitat.

Biological Opinions

The California Department of Water Resources (DWR) and U.S. Bureau of Reclamation (Reclamation) are the project proponents for WaterFix and Reclamation is the lead federal agency. ESA Section 7 requires the lead federal agency to submit a Biological Assessment (BA) to the relevant federal fish and wildlife agency if it plans to initiate major construction activity or other actions having similar physical impacts. If the agency's assessment determines that the proposed action is likely to have an adverse impact on such species, then the agency submits a request to the relevant federal agency to undergo Formal Consultation.

As part of this process, Reclamation prepared a BA in 2016, which determined potential adverse effects. Reclamation subsequently requested Formal Consultation with USFWS and NMFS.

The USFWS is responsible for actions related to freshwater listed species (e.g., delta smelt), while NMFS reviews potential impacts to anadromous listed species (e.g.,

¹ USFWS: <https://www.fws.gov/sfbaydelta/HabitatConservation/CalWaterFix/Index.htm>
NMFS: http://www.westcoast.fisheries.noaa.gov/central_valley/CAWaterFix.html

winter-run Chinook salmon). Each prepare a BiOp stating whether the action is likely to jeopardize the existence of a listed species, or destroy or adversely modify designated critical habitat.

In addition, DWR has submitted an incidental take permit application (also known as a 2081(b)) to the California Department of Fish and Wildlife (DFW).^{2, 3} This is required by the California Endangered Species Act (CESA), and will address incidental take of State-listed species. The federal and State processes are closely coordinated due to the potential similar impacts and select species listed at the both the federal and State levels.

Next Steps and Anticipated Timelines

Timelines for the WaterFix project have consistently fluctuated. The Final BiOps were expected as early as September 2016, and many other aspects of the project have been delayed. Estimated timelines for relevant regulatory processes described here are based on the status of current regulatory processes and hearings.

The State Water Resources Control Board's California WaterFix hearing proceedings are ongoing. Part 1B, rebuttal on potential injury to legal users of water, is scheduled to last until August 10, 2017. No dates have been established for the start of Part 2 of the hearing, and it is anticipated that a ruling from the Water Board might not come until well into 2018.

Several additional permits also would be required before the project could be constructed. These include permits under sections 401, 404, and 408 of the Clean Water Act, and a streambed alteration permit from DFW. Estimated timelines for these range from late 2017 until 2020. It is not clear whether these permits would be issued before DWR would submit a certification of consistency to the Council.

Fiscal Information

Not applicable.

List of Attachments

Attachment 1: Listed species analyzed under the USFWS and NMFS BiOps, and DFW 2081(b).

Attachment 2: Map of the proposed California WaterFix project

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² http://cms.capitoltechsolutions.com/ClientData/CaliforniaWaterFix/uploads/CWF_2081b_TOC.pdf

³ <https://www.wildlife.ca.gov/Conservation/Watersheds/CWF>